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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DAISY Z., Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; CONTRA COSTA COUNTY CHILDREN & FAMILY SERVICES BUREAU, Real Party in Interest.	A156003 (Contra Costa County Super. Ct. No. J1800728)

The juvenile court declined to order services to reunify Daisy Z. with her six-month-old son J.Z. pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10), on the ground she had failed to reunify with J.Z.'s older half-sister in another case.[1] That provision authorizes the juvenile court to bypass reunification services upon a finding by clear and convincing evidence that "the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) [i.e., the parent from whose custody the child has been removed] and that, according to the

[1] All further statutory references are to the Welfare and Institutions Code.

findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian."

Mother now petitions for writ relief challenging the juvenile court's December 10, 2018 order bypassing reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26 to select a permanent plan for her infant son. She contends the court erred in bypassing reunification services for her under section 361.5, subdivision (b)(10). We agree. Accordingly, we grant her petition.

BACKGROUND

In 2013, child protective authorities in San Francisco County received a referral that mother had physically abused her ten-month-old daughter, Isabella. The child's father had reported to police that mother had made several threats to harm the baby (and had sent him photographic proof), including threats to burn the baby with a lighter, stand on top of the baby as she lay face down on the floor, and strangle the baby's neck with a cord. In addition, mother also threatened to harm the baby with a heated knife, and then she started to carry out that threat, but the baby's father intervened before she could harm the child, left home with the child and called police. Mother admitted to police that she had threatened to cut, burn or withhold food from their baby daughter. She was arrested, convicted of felony child cruelty, received a six-year sentence and was incarcerated for three years.

The incident precipitated a dependency proceeding in San Francisco, which remained pending in 2013 for approximately six months.[2] The San Francisco juvenile court sustained (unspecified) allegations under section 300 subdivisions (a) and (b), ordered family maintenance services to the baby's father and "supportive services" to mother who was incarcerated, and ultimately in October 2013 dismissed the petition and

[2] The petition is not in the record.

terminated jurisdiction with an award of full physical and legal custody of the child to her father, with supervised visitation to mother.

Several years later, in January 2017, a second dependency proceeding was commenced for Isabella in Contra Costa County Superior Court after mother had been arrested by the Richmond Police Department for child cruelty (Pen. Code, § 273a) and a probation violation. In violation of court orders, the girl's father had allowed mother to care for the four-year-old little girl without supervision, and the youngster had been found crying in the street because mother had left her at home unattended. A three-year restraining order was entered on March 15, 2017, prohibiting mother from having any contact with Isabella other than as ordered by the juvenile court. And both parents were offered reunification services.[3]

J.Z. was born while that second case was pending, and he was immediately taken into protective custody by Contra Costa County child welfare officials while still in the hospital, due to concerns for his safety. Among other things, mother had made limited progress on her case plan in Isabella's case, and mother also admitted during an interview in the hospital that J.Z.'s own father (mother's new boyfriend) had physically assaulted her while she was pregnant with J.Z.

This dependency proceeding was commenced the day after J.Z. was born, on August 1, 2018. The juvenile court sustained allegations that the newborn boy was at risk of serious harm for two reasons: because his biological father had physically assaulted mother while she was pregnant (and was criminally convicted as a result), and because mother had failed to reunify with J.Z.'s half-sister, Isabella. Subsequently, on September 24, 2018, the juvenile court terminated reunification services for mother in Isabella's case. Approximately two months later at a contested disposition hearing in this case, the juvenile court bypassed reunification services for mother with respect to J.Z. on

[3] The petition, again, is not in the record.

the ground mother had not made reasonable efforts to address the issues in Isabella's dependency proceeding. It set a section 366.25 hearing for March 25, 2019, and this writ petition followed.

DISCUSSION

Mother concedes that reunification services were terminated as to J.Z.'s half-sister Isabella, but contends that substantial evidence doesn't support the court's finding that Isabella was previously removed from her care because there is nothing in the (limited) record of either prior case indicating mother ever had physical custody of Isabella. The Contra Costa Children and Family Services Bureau (the Bureau) concedes this issue on the state of the present record, and therefore agrees the order should be reversed on this basis and suggests the case be remanded for a new hearing.

Despite the Bureau's concession, we reject this argument for two reasons, one factual and the other one legal. First, the record indicates that at some point mother *did* live with Isabella's father and share custody of their daughter: the disposition report notes that the two were married and that one source of "tension" in their relationship was the fact that mother "had to quit her job to care for Isabella." Second, even if Isabella had never been in mother's physical custody, the legal premise of mother's argument is mistaken. *In re B.H.* (2016) 243 Cal.App.4th 729, a case not cited by either party, holds section 361.5, subdivision (b)(10) applies to a parent who did not have physical custody of the sibling with whom they failed to reunify. In rejecting a narrow interpretation of the exception, it explained: "We are not persuaded by Father's claim during oral argument that section 361.5, subdivision (b)(10), does not apply to a noncustodial parent of the child's sibling or half sibling. Father appears to interpret the term 'removal' in section 361.5, subdivision (b)(10), to mean the taking of the child 'from the physical custody of [the parent] with whom the child resides at the time the petition was initiated,' as defined in section 361, subdivision (c), and argues a child cannot be 'removed' from a noncustodial parent. [Citations.] In this context, we find the term 'removal'

encompasses the continued removal of the child's sibling or half sibling from the care of his or her parent during the previous dependency proceedings, notwithstanding the parent's custodial status. 'Custody,' based on the definitions of 'custody' in the Welfare and Institutions Code, the Family Code, the California Code of Regulations, and Black's Law Dictionary, connotes 'the parent has the right to make decisions pertaining to the child, and has legal possession of the child.' [Citations.] We believe the Legislature contemplated section 361.5, subdivision (b)(10), to apply in these circumstances whether or not a parent has *custody* of the child's sibling or half sibling." (*Id*. at pp. 738–739.)

And it explained the absurdity of a contrary construction: "Interpreting section 361.5, subdivision (b)(10), to apply only to custodial parents would result in absurd consequences. . . . Such an interpretation would delay permanency for the child of a noncustodial parent who had been unable or unwilling to reunify with the child's sibling or half sibling. This would lead to an inconsistent application of the bypass provision depending on the custodial status of the parent at the time the sibling's or half sibling's dependency proceeding was initiated, notwithstanding the fact that a parent was unable to reunify with the sibling or half sibling and a parent's circumstances had merited termination of his or her parental rights to the child's sibling or half sibling." (*Id*. at p. 739.) In short, mother's assumption that section 361.5, subdivision (b)(10) does not apply unless the sibling with whom a parent failed to reunify was removed from the parent's physical custody is not the law.

We do agree, however, with mother's second argument: that the juvenile court's finding she failed to make reasonable efforts to treat the problems that led to the removal of J.Z.'s half-sister in the other cases is not supported by substantial evidence. The Bureau has not responded to this point, and it is unnecessary to analyze at length the law or evidence bearing on this issue which is fairly and adequately summarized in mother's petition. Principally for the reasons she discusses, and as reflected in *In re Albert T.* (2006) 144 Cal.App.4th 207 which reversed a court's bypass of reunification services for

lack of substantial evidence in similar circumstances, we conclude the court erred in applying the bypass provision of section 361.5, subdivision (b)(10). The juvenile court's stated concerns with mother's failure to address domestic violence problems and/or engage in drug testing and/or to visit regularly with Isabella were not the reasons Isabella had been removed from parental custody and adjudged a dependent. (See *In re Albert T.*, 144 Cal.App.4th at p. 220 [although domestic violence was a concern at time of sibling's removal, "the reasonable-efforts-to-treat prong of section 361.5, subdivision (b)(10), is directed not to *all* the issues that confronted a parent in a prior dependency proceeding but specifically to 'the problems that led to the removal of the sibling' "].) Rather, Isabella was removed because of physical abuse (in the first case) and neglect (in the second case). The "reasonable effort to treat" standard is directed to a parent's efforts, not a parent's success or failure in abolishing past problems. It " 'is not synonymous with "cure." The mere fact that [the parent] has not entirely abolished her [past] problem would not preclude the court from determining that she had made reasonable efforts to treat it.' " (*Id*. at p. 221.) Here, mother had engaged in therapy while incarcerated, she acknowledged that she had made mistakes later in leaving Isabella alone and unattended and had recently enrolled in a parenting class and begun therapy anew. Particularly in light of the limited record made about the prior dependency cases, this record does not contain substantial evidence that mother failed to make reasonable efforts to treat her past problems that led to the removal of Isabella. (See *In re D.H.* (2014) 230 Cal.App.4th 807, 815–817 [finding held unsupported where, inter alia, record does not contain case plan for siblings' dependency case or "any report of specific services provided to father in the context of that case"].)

DISPOSITION

Let a peremptory writ of mandate issue, directing the juvenile court to vacate its December 10, 2018 order bypassing reunification services and setting a permanency

planning hearing under Welfare and Institutions Code section 366.26. Our decision is final as to this court immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.